**Belgium**
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# I. Introduction

## 1. History

Shortly after the Second World War, the first steps were taken in Belgium, in order to give a legal form to the "collective will" to yield profits from investments. However, it took more than ten years before that legal framework became effective.

The law of 27 March 1957 offered the possibility to create investment funds. These funds do not have their own legal personality. As a result, they could not be owners of their own portfolios. Their members were the legal owners. Progressive withholding taxes were immediately supported by the funds but could be deducted by the member for the end-of the-year taxes by the member. This Belgian legislation remained unchanged for about thirty years.

Shortly after the implementation of the legal framework in 1957, these funds aroused reasonable interest. At the end of the seventies, partly because of increasing inflation caused by the two oil crises, interest for the funds began to wane. We could then observe a persistent tendency to withdrawals and even the disappearance of some funds.

In order to fight the economic recession at the beginning of the eighties, the government took a series of important legal initiatives. These initiatives had a positive impact on investment funds. The goal of these measures was mainly to encourage the possession of shares by private individuals.[1] The taxable individual acquiring new shares was able to deduct the purchase price from his taxable income, up to a maximum of BEF40,000 increased by BEF 10,000 per dependant and spouse. However, they had to keep these shares for at least five years. Investment fund certificates also qualified for this favorable measure, providing that profits were invested according to the legislation. Investment funds then became very popular. This measure remained in force until 1985.

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1 RD (Royal Decree) no. 15 of 9 March 1982 favoring the registration or the purchase of shares or proof of shareholding in Belgian companies, BLG (Belgian Law Gazette) 13.3.1982.

In early 1987, these funds began to loose their attractiveness. The reason was Luxembourg's SICAVs which allowed the individual investor to avoid withholding taxes. Moreover, in Belgium, withholding taxes had risen from 20 per cent to 25 per cent.

We had to wait until 1990 and the law of 4 December 1990: "Law on financial transactions and financial markets". This law resulted from the European Directive of 20 December 1985 "on the coordination of legal and administrative regulations regarding certain institutions for collective investment in shares", modified by the directive of 22 March 1988.[2] Together with a significant re-shaping of the share market, a new legal framework was created for collective investment institutions.

The provisions of the law of 27 March 1957 on investment funds were taken up with almost no modifications. However, the important element was the creation of a legal and fiscal framework for investment companies. Like investment funds, the main purpose of these companies is the public collection of money in order to invest it. Therefore, they issue shares.

Unlike investment funds, investment companies have their own legal personality, founded according to the usual legal forms like a limited liability company (LLC) or a limited stock partnership (LSP ). They own their portfolio.

The Royal Decree (RD) of 4 March 1991 authorized the creation of investment institutions trading and investing in registered shares and liquid funds or investments meeting the EEC directives. From that time on, Belgian institutions for collective investment have met with increasing success and open-end as well as closed-end investment companies have popped up like mushrooms after the rain.

The government also contributed to this development and, by royal decree (RD) of 10 April 1995, authorized the creation of investment companies investing mainly in realty (realty closed end investment company).

We had to wait for the law of 5 August 1992 to see the creation of a legal framework for institutions investing in claims. The related Royal Decrees (RD) authorizing their establishment were issued on 29 November 1993 and on 7 April 1995.

## 2. Recent evolution

The market itself changed and evolved considerably. Those who offered collective investments are now anticipating the investors' specific needs and wishes. New products are launched, and the range of portfolios proposed has widened.

For example, some investment companies propose investment products with a fixed yield, that by their characteristics, are very similar to classic savings products. These investment companies are better know under the denomination "FIX-funds".[3] In fact these are compartments of a mutual open end investment company with a fixed date of maturity and for which a defined fixed yield is

[2] 85/611/EEG and 88/220/EEG.

[3] Fix-funds: yields from shares paid or attributed by investment companies from the total or partial distribution of their corporate capital or by the acquisition of their own shares, providing that commitments were taken on in the context of public share supply in Belgium, and defined in

established. While the Belgian government shows the will to keep on stimulating the collective investment market, we can observe that it is trying to put a spoke in the wheels of fix-funds. From now on, the Treasury will consider the profits of these fixed funds as interest on which withholding taxes are due. However, it is still unclear what is really meant by "amount reimbursed or yield basis". As a compensation, the stock exchange duty will be lowered on this type of investment product. Tariffs are the same as those applicable to investment funds.

In order to stimulate venture capital, the government is working on a law that would allow the establishment of investment institutions for the investment of private equity (*PRIVAK* – PRIvate equity *beVAK, bevak* – open end investment company). From a fiscal point of view, *privaks* will be handled in the same way as realty closed end investment companies. However, lawmakers have provided for a significant exception. Capital gains on shares held by *PRIVAKs* will be subject to a transparency rule; this means that *PRIVAKs* are not be taxed on this gain in the corporate tax, but it is considered that the shareholders themselves have realized the capital gain. This exemption is only applicable when the *PRIVAK* invests in companies that are subject to corporate tax.

In parallel with the creation *of PRIVAKs*, the government is contemplating the possibility of offering the investment institutions which are investing in claims the opportunity to attract funds through channels other than public issue. Average investors are not very familiar with this type of collective investment, therefore, the obligation of public issue rather constitutes a brake for the development of this kind of investment. The main advantages of a share-production transaction is that different sorts of shares are often issued which are specially adapted to concrete transactions and placed by professional investors.[4]

## II. Description

We can describe an institution for collective investments as a type of investment for the collective investment of capital, attracted publicly in Belgium or abroad. We can find the basis of the regulation in the law of 4 December 1990 ("giga" law) on financial transactions and financial markets; and in the Royal Decrees (RD) of 4 March 1991 and 10 April 1995.

*cont.*

terms of amounts reimbursed or yield base and providing that these commitments concern a period less than or equal to eight years. Art. 19§ 1, 4° WIB/92 – modified by art. 4 of the law of 20 March 1996, BLG (Belgian Law Gazette) 7.5.1996.

4 Explanatory note on the bill for the modification of the law of 4 December 1990 on financial transactions and financial markets, art. 2075 of the civil code, art. 2, heading VI, book I of the Commercial Code, art. 22 of the law of 10 June 1964 on public issue, art. 44 of the VAT Code and art. 265 of the 1992 Law Book of Income Tax; (641/1–95/96 p. 2).

The law classifies investment institutions in four categories, according to private law:[5]

(a) investment funds with a variable number of securities (open end funds);
(b) investment funds with a fixed number of securities (closed end funds);
(c) investment companies with a variable number of securities (open end investment companies);
(d) investment companies with a fixed number of securities (closed end investment companies).

An investment fund is an undivided capital administered by an acting company. The fund does not have its own legal personality.

An open end investment company is an investment institution founded as a limited liability company (LLC) or limited liability share partnership (LLSP), in which the capital varies without modification of the bylaws, according to the issue of new shares or purchase of its shares.

A closed end investment company is an investment institution founded as a limited liability company (LLC) or limited liability share partnership (LLSP), in which the securities are not purchased on demand of the holders of the assets of this institution.

## III. Bylaws of Belgian investment institutions according to private law

### 1. Common regulations

Investment institutions are ruled by an agreement (for investment funds) or by bylaws (for investment companies).[6]

Each investment company is managed or administered in the interest of the participants exclusively.[7] All participants have equal rights. However, contrary to the common Belgian legal regulation on the indivisibility of the corporate patrimony, open end investment companies can divide their capital into different compartments. Toward shareholders and creditors, the capital constitutes a totally separate entity. The advantage is that the bylaws have provided for it. An investment fund and a closed end investment company can not create compartments.[8]

Net yields are determined and paid out or capitalized according to the rules and regulations or according to the bylaws.[9]

5 Herman De Rijck: "De reglementaire omkadering van de beleggingsinstellingen in België" ("The regulatory framework of investment institutions in Belgium") *Revue de la banque/Bank– en financiewezen* 2/1994 p 83.

6 Art. 108, law of 4 December 1990 ; BLG 22 December 1990.

7 Art. 108, law of 4 December 1990, BLG 22 December 1990.

8 Herman De Rijck: "De reglementaire omkadering van de beleggingsinstellingen in België" (The regulatory framework of investment institutions in Belgium); *Revue de la banque/Bank en Financiewezen;* 2/1994 p. 84.
Art. 109, §2 law of 4 December 1990; BLG 22 December 1990.

9 Art. 109, §1 law of 4 December 1990; BLG 22 December 1990.

## 2. Investment funds

An investment fund can only have as purpose the collective investment of investments authorized by law (see below) for which an organized market exists. Financial means must be collected exclusively by public issue of securities that are not negotiable and not under the form of shares.[10]

In open-end investment funds, securities can be purchased upon demand by the shareholders to the detriment of the capital on the basis of an assumed inventory value,[11] in contrast to closed end funds.

As we know by now, a fund represents an indivisible capital. This capital is administered by an acting company. This acting company can administer several Belgian investment funds. The acting company must comply to the legal provisions that are applicable to the funds, as well as the regulations and provisions of the rules and regulations.[12]

An investment fund must have rules and regulations. It contains provisions on the purpose of the investment funds, the management and administrative rules that are applicable in that case, the respective rights and duties of the acting company, the registrar and the participants.

This type of rules and regulations can only be modified with the explicit approval of the *Commissie voor het Bank- en Financiewezen* (CBF, Bank and Finance Commission).

The rules and regulations must also specify in which cases and under which conditions the acting company is allowed to exert the voting rights of the shares in the fund.[13]

## 3. Open end investment companies: closed end investment companies

Open end investment companies and closed end investment companies are institutions for collective investment founded in the form of a company. The authorized corporate forms are: the limited liability company (LLC) and the Limited Stock Partnership (LSP).

As for funds, the only activity authorized is the collective investment of capital collected by public issue, in Belgium or abroad.

Moreover, an investment company cannot own any assets other than those necessary for the achievement of its statutory purpose.

10 Art. 110, 1° to 3° law of 4 December 1990; BLG 22 December 1990.
11 Art. 110 4° law of 4 December 1990; BLG 22 December 1990.
12 Art. 111, §1 and 2 law of 4 December 1990; BLG 22 December 1990.
13 Art. 112, law of 4 December 1990; BLG 22 December 1990.

Open end- and closed end companies are companies and are thus subject to the coordinated laws on commercial companies, except for the exceptions provided by the law of 4 December 1990.

- The corporate name must always mention the type of investment chosen.
- The corporate capital must amount to BEF50,000,000 minimum.
- Shares must be paid in full upon registration and no shares which do not represent the capital can be allotted.
- Some articles of the coordinated laws on commercial companies are not applicable to investment companies (i.e. establishment-increase in capital with open end investment company dividend warrants ...).[14]

The bylaws of an open end investment company can provide for different categories of shares to be created, in which each category corresponds to a separate part or compartment of the capital. In this case the bylaws must establish, taking the shareholders' equality into consideration, the way administrative costs will be charged in the company and per compartment, as well as the way the general assembly will exert its voting rights, ratify the annual accounts and grant discharges to the registrars and auditors. Moreover, in regard to third parties, each agreement or transaction must be attributed explicitly to one or more compartments.[15]

Closed end investment companies cannot create compartments. A real-estate investment company can only have the form of a closed end investment company.

## IV. The administrative law status

### 1. Registration

Before being able to exercise their activities, investment institutions must be registered at the *Commissie voor het Bank- en Financiewezen* (Bank and Finance Commission).

An investment fund can be registered only when the following conditions are met:[16]

14 Art. 115 and 119 law of 4 December 1990; BLG. 22 December 1990 in contravention of arts. 81, 104, 106 and 114 of the coordinated laws on commercial companies, open and closed end investment companies; arts. 29, 29ter, 29quater, 33bis, 34bis, 41, first section, 46, first and second section, 47, 50, 51, 52bis, 64, §2, 70bis 71, 72, 72bis, 72ter, 75, 77, 77, fifth and sixth 77bis and 81, before last section of the coordinated laws on commercial companies are not applicable to open end investment companies arts. 29, §§1,2 and 5, 29ter, 46 first and second sections, 64, §2, 70bis, 77, sixth section of the coordinated laws on commercial companies are not applicable to open end investment companies.

15 Art. 115, §6 law of 4 December 1990; BLG 22 December 1990.

16 Art. 122 law of 4 December 1990; BLG 22 December 1990.

(a) The acting company is recognized.
(b) The rules and regulations of the investment fund are ratified.
(c) The choice of the registrar of the investment fund is ratified.

An investment company can be registered only when the following conditions are met:[17]

(a) The investment company is recognized.
(b) The bylaws are ratified.
(c) The choice of the registrar of the investment company is accepted.

The concrete compliance to these conditions is mentioned by the Royal Decree (RD) of 4 March 1990, but then only for investment institutions investing in:[18]

(a) investments that comply to the provisions of the Directive.[19]
(b) shares and liquid assets.

Later, in April 1995, a separate Royal Decree (RD) was issued ruling on the conditions for the registration of real-estate closed end investment companies (investment institution which invests exclusively in real-estate).[20]

For other authorized forms of investment, no Royal Decree (RD) has been issued, and no investment institutions investing in other categories can be created yet.

The registrars of the acting company and the investment company, as well as the persons who are actually in charge of daily administration must be professionally reliable and have the experience required by this function.

Any modification in the control of the acting company, replacement of the acting company, of the registrar, modification of the rules and regulations, of the bylaws, must be approved beforehand by the *Commissie voor het Bank- en Financiewezen* (CBF, Bank and Finance Commission).

## 2. Investment policy

Investment institutions can invest in one of the following categories of authorized investments:[21]

1. investments meeting the provisions of the Directive;
2. shares and liquid assets;

17 *Ibid.*

18 RD of 4 March 1991; BLG of 9 March 1991. Recognition of controlling companies or investment companies are mentioned in arts. 3 to 5. The provisions for the rules and regulations can be found in arts. 6 to and including art. 9. The assumption of the registrar is ruled in arts. 10 to and including art. 12.

19 Directive 85/611/EEC of the Council of the European Communities of 20 December 1985 on the coordination of the legal regulatory and administrative regulations concerning the institution for collective investment in shares, modified by the Directive of the Council (88/220/EEC) of 22 March 1988. Recommendation 85/612/EEC of the Council of 20 December 1985 concerning art. 25, section 1, second para, of the directive 85/611/EEC.

20 RD of 10 April 1995; BLG of 23 May 1995. Art. 4 to and including art. 7: the recognition as real-estate open end investment company. Art. 8 to and including art. 11 : the ratification of the bylaws. Art. 12 to and including art. 16 : the assumption of the registrar.

21 Art. 122 law of 4 December 1990; BLG 22 December 1990.

3. raw materials, options and forward contracts on raw materials;
4. options and forward contracts on shares, currencies and stock indexes;
5. real estate;
6. high-risk capital;
7. other investments that must still be determined.

To this day, only implementing orders have been issued regarding the provisions and prohibitory clauses applicable for each investment category, for categories 1–2 and 5 (1 and 2: Royal Decree (RD) of 4 March 1991; 5: Royal Decree (RD) of 10 April 1995), notably spreading risk coefficients – the modalities according to which costs are charged – measures to avoid conflict of interests – calculation of the stock-taking value.[22]

## 3. Issue and trade of shares and securities

The law guarantees free withdrawal from open end investment institutions against the net stock-taking value. The stock-taking value is calculated on the day of entry or withdrawal, or on the following day.[23]

This net stock-taking value represents the net assets value per holding right, or share of the institution or compartment.[24]

While the principle of free withdrawal is almost absolute in open end institutions, the controlling organ of the investment institution can put some restrictions to this principle of free withdrawal in a limited number of cases. These restrictions must be described in a statutory or in a regulatory way and communicated to the public in the leaflet.[25]

Every day in which an entry or a withdrawal occurs in an open investment institution, the net stock-taking value must be communicated.

For closed end investment institutions, there is no right to free entry and withdrawal. In order to guarantee maximum liquidity for the securities, there is the obligation for the rights to be quoted on the stock market. For the open end investment institutions, the stock market quotation is optional.[26]

22 These regulations can be found in the RD of 4 March 1991; BLG of 9 March 1991 more specifically in arts. 13, 14, 15, 16 and 35 to and including art. 44 on institutions for collective investment (ICI) investing in shares and liquid assets and those investing in investments which meet the provisions of the Directive. Regarding real-estate closed end investment companies, the regulations can be found in the RD of 10 April 1995; BLG of 23 May 1995: arts. 17, 18, 19, 20, 21, 40 to and including art. 47.

23 Art. 124, §1 law of 4 December 1990; BLG 22 December 1990.

24 The rules for the calculation of the stock-taking value can be found in the RD of 4 March 1991 BLG. 9 March 1991 arts. 50 to 52 inclusive for the ICIs investing in category (1) of art. 122, §1 of the law of 4 March 1990; and in arts. 68 to 70 inclusive for ICIs investing in category (2) of art. 122, §1 of the law of 4 March 1990.

25 Art. 123, second section 5° law of 4 December 1990; BLG 22 December 1990; as well as arts. 18 and 19 of the RD of 4 March 1991 BLG 9 March 1991 on investment institutions investing in categories (1) and (2) of art. 122 § 1 of the law of 4 December 1990 BLG 22 December 1990.

26 Art. 125 and art. 124, §2; second section of the law of 4 December 1990; BLG 22 December 1990.

## 4. Prohibitory clauses

It is prohibited for the investment institutions to acquire a number of shares that would allow them to exert an influence on the management of the issuing company. In other words, the acquisition of control holdings is excluded. To prevent this, maximal thresholds were established in the royal decree (RD).[27]

An investment institution cannot make voting arrangements, commit itself not to sell shares or conclude agreements affecting its autonomy of control.[28]

The following actions are theoretically prohibited, but are sometimes allowed within certain limits (RDs):[29]

(a) take out a loan;
(b) sell from uncovered positions;
(c) take on issues or guarantee their favorable outcome;
(d) lend shares, grant credit or stand as guarantee.

## 5. Data publicity

The investment institutions must publicize a leaflet, an annual report per fiscal year and a semi-annual report on the first six months.[30]

The reports must include a detailed inventory of the capital and an income statement.

Moreover, there are special account regulations – inventory assessment – drafting annual reports and publicizing them – that are provided for by the royal decrees (RDs) concerned.[31]

The annual and semi-annual reports must always be handed over to the *Commissie voor het Bank- en Financiewezen* (CBF, Bank and Finance Commission).

## 6. Control

Investment institutions are subject to the control of the *Commissie voor het Bank- en Financiewezen* (CBF, Bank and Finance Commission).

In the controlling company or the investment company, the general meeting names one or several auditors, in accordance with the coordinated laws on commercial companies.

27 Art. 126, §1 law of 4 December 1990; BLG 22 December 1990.

28 Art. 126, §2 law of 4 December 1990; BLG 22 December 1990.

29 Arts. 45 to 49 RD inclusive, of the law of 4 March 1991; BLG of 9 March 1991 for ICIs investing in category (1) of art. 122, §1 of the law of 4 December 1990; BLG. 22 December 1990 and arts. 63 to 67 inclusive of the same RD on institutions investing in category (2) of art. 122, §1 of the law of 4 December 1990; BLG 22 December 1990. The specific prohibitory clauses for a real-estate closed end investment company can be found in the RD of 10 April 1995; BLG 23 May 1995; arts. 48 to 54 inclusive. Among others, there are special regulations about the debt status of real-estate closed end investment companies.

30 Art. 129 law of 4 December 1990; BLG 22 December 1990; and arts. 28–29 of the RD; of 4 March 1991 BLG 9 March 1991.

31 Arts. 30–31 of the RD of 4 March 1991 BLG 9 March 1991; and arts. 55 to 61 inclusive of the RD of 10 April 1995; BLG of 23 May 1995.

For the control, the bank and Finance Commission (BFC) has an extended authority and can thus sanction the investment institution in case it no longer complies to the legal specifications.[32]

## 7. Harmonized and non-harmonized investment institutions

This difference is important for companies which would like to commercialize their securities abroad. Access to other European financial markets is facilitated by this harmonization.

Here, the basis is the European directive of 20 December 1985–85/611 EEC.

### *7.1. Harmonized investment institutions*[33]

For a number of open end investment institutions, the directive has brought harmonization at European level of the access, control, creation, activity and the information to be publicized. The rule prevailing in this case is that the control authority of one member of the European Union acknowledges that the institution founded in the state in question meets the harmonized regulations applicable on its market.[34]

With this recognition, and providing that it complies to the rules in force in a certain member state in terms of the commercialization of securities, the institution can trade its securities in that country. The member state of origin is in charge of the control.

Note that harmonization rules are only applicable for investment institutions of the open type.

The Directive is incorporated in the law of 4 December 1990 and in the Royal Decree (RD) of 4 March 1991.

The main elements are the following:[35]

(a) Investment institutions are of the open type and invest in shares.
(b) They invest while taking into account an established investment risk spreading.

32 The strict control measures are included in arts. 131 to 136 inclusive of the law of 4 December 1990, BLG 22 December 1990. So, the Finance and Banking Commission can have access to all information or investigate on the spot and consult all documents of an investment company, an acting company or a registrar in terms of the functioning of the organization and the compliance with legal regulations.

33 The goal of the European directive was mainly to: harmonize competitive advantages; protect investors; establish the principle of "income country control"; create a "European passport for the ICC".

34 Herman De Rijck: "De reglementaire omkadering van de beleggingsinstellingen in België" (The regulatory framework of investment institutes in Belgium); *Revue de la banque/Bank en Financiewezen,* 2/1994 p.84–85.

35 Herman De Rijck : "De reglementaire omkadering van de beleggingsinstellingen in België" (The regulatory framework of investment institutions in Belgium); *Revue de la banque / Bank en Financiewezen,* 2/1994 p.84. Art. 109 §2 law of 4 December 1990; BLG 22 December 1990.

(c) Limits in terms of investment in shares are set as a function of the marketability of the assets and the risk concentration per issuer.
(d) The use of derived financial tools is authorized within certain limits and mainly with the objective of covering the investment risks.
(e) Borrowing capacity is marginal and uncovered share positions are prohibited.
(f) Liquid assets can represent a maximum of 49 per cent of the net capital.
(g) It is prohibited to take out a loan or stand as guarantee.
(h) It is prohibited to take part in take-over or guarantee association or in any kind of financial association.

### *7.2. Investment institutions which are not harmonized*

Investment institutions which are not harmonized invest in shares and liquid assets. Legal regulations are also included in the law of 4 December 1990 and in the RD of 4 March 1991.

Many of these non-harmonized institutions are quite similar to harmonized institutions. Differences include a more specialized investment objective and less strict investment regulations.

In order to expand outside their country of establishment, investment institutions need an authorization released by the competent authorities of that country. The special provisions for the acceptance on the Belgian market can be found in the Royal Decree (RD) of 23 October 1991,[36]

The main conditions are:

(a) The investment institutions must, in their country of origin, be subject to a permanent control by the authorities or by an organ named by the authorities in the context of the protection of public savings. This supervision must be exerted in parallel with the control exerted by the *Commissie voor het Bank- en Financiewezen* (CBF, Bank and Finance Commission).
(b) The rules and regulations-bylaws must be ratified by the *Commissie voor het Bank- en Financiewezen* (CBF, Bank and Finance Commission), as well as the choice of administrator and registrar.
(c) The investment institutions must designate a local financial institution for the payment of the participants, for the sale and purchase of securities, to supply information and to supply the Bank and Finance Commission with the data necessary.
(d) They must prove that they meet the conditions to which Belgian institutions are subject in terms of registration by the Bank and Finance Commission.
(e) The rules and regulations-bylaws must be similar to the scheme recommended by the royal decree (RD) (schema C)
(f) The investment policy must be accepted by the Bank and Finance Commission: investment in shares, in share categories that are open to Belgian institutions.

[36] RD of 23 October 1991, RD 9 November 1991 in implementation of art. 141 of the law of 4 December 1990; BLG of 22 December 1990.

(g) For investment institutions of the closed end type, there is also the obligation of stock-market quotation.

## V. Institutions for the investment in claims

### 1. General aspects

The law of 5 August 1992[37] included a new category of institutions for collective investment. This new category is called "Institutions for Investment in Claims" (IIDC)

The regulation is included in the Royal Decree (RD) of 29 November 1993, Belgian Law Gazette (BLG) of 7 December 1993, modified by the RD of 7 April 1995; Belgian Law Gazette (BLG) of 3 May 1995 and the Royal Decree (RD) of 30 May 1995; Belgian Law Gazette (BLG) 2 July 1995.

An institution for investment in claims (IIDC) invests in debts transferred by third parties. These claims form one or more claims packages, in which each package has homogenous characteristics in terms of nature and the risks related to this nature.

Financial means must, at least partly, come from the public (shares – securities – bonds).

An institution for the investment in claims (IIDC) is of the closed-end type. Securities cannot be purchased by the institution upon request by the holders. Securities that were attracted by means of public issue must be quoted on the stock market.

The law of 5 August 1992 was integrated in the law of 4 December 1990. We will only review here the regulations that are specific to institutions for investment in claims (IIC).

### 2. Legal framework

An institution for investment in claims (IIC) can take two legal forms: a fund for investment in claims (FIC), or a company for investment in claims (CIC)

A FIC represents an indivisible capital administered on behalf of the participants by an acting company. A FIC does not have its own legal personality.

A CIC can take the form of a limited liability company (LLC) or a limited stock partnership (LSP) and has a legal personality. Thus a CIC is subject to the

37 Law of 5 August 1992; BLG. 9 September 1992 modifying the law of 4 December 1990 included in book III, chapter I with a new header IV: "The institutions for investment in claims".

coordinated laws on commercial companies, unless the contrary is explicitly specified by the law.[38]

The capital of a CIC is divided into one fixed and one variable part. The fixed part must amount to a least BEF 1.250.000 and must be fully paid in. The capital above the minimum is variable and can be reduced without modification of the bylaws as a function of the redemption of debts. However, in case a CIC has issued a bond loan, a capital decrease can only take place in proportion to the reimbursement of the bond loan.[39]

In order to be able to start its activities, an IIC must first be registered in the list of Belgian Investment Institutions. This is only possible when the following conditions are met:[40]

(a) the acting company is recognized;
(b) the rules and regulations are ratified;
(c) the choice of the registrar is ratified;
(d) the choice of the controlling company is ratified.

In contrast to other companies for collective investment, we can see here that a fourth condition has been added, the ratification of the choice of a controlling company. This is due to the fact that the tasks incumbent to the registrar in institutions for collective investment are shared by the registrar and the controlling company in IICs.

The registrar only has the function of material keeper, while the other responsibilities are transferred to the controlling company.

## 3. Investment policy

The portfolio is composed according to the principle of risk spreading.

All possible types of claims are involved: bank claims (mortgage, commercial claims, consumer credit, corporate credit leasing ...). However, it must always be claims with conditions that are established by contract especially the reimbursement amounts and dates.[41]

38 The appellation of the investment institution is in contravention with arts. 81,106 and 114, first part of the coordinated laws on commercial companies. The appellation must always contain the words : "company for investment in claims according to Belgian law" Furthermore, arts. 29, § 1, §2 and §5, 29ter, 46, first and second part; 64, §2, 70bis, 77, sixth part and 72bis regarding the variable part of the capital, of the coordinated laws on commercial companies not applicable.

39 Art. 119sexies, §3, second part incorporated to the law of 4 December 1990 by art. 4 of the law of 5 August 1992, BLG 9 September 1992.

40 Arts.2 to 19 inclusive of the RD of 29 November 1993 regarding the conditions for registration. The conditions for registration that were modified by arts. 1 to 12 inclusive of the RD of 7 April 1995 BLG of 3 May 1995–addition of a controlling company.

41 Ivan Peeters: "Het Belgisch wettelijk kader voor effectisering van schuldvorderingen" (The Belgian legal framework for the "sharization" of claims) *Revue de la banque/Bank en Financiewezen,* 8 October 1994, p. 474.

The total portfolio of a IIC can represent one or several claim packages. Each package must:[42]

(a) have homogeneous characteristics;
(b) be acquired in its whole on a determined date.
(c) at the time of the transfer, be entirely financed by the issue of one or several categories of shares. This makes gradual building of a portfolio difficult.

The rules and regulations or the bylaws can provide that in case of reimbursement of a claim, reinvestment in a similar type of claim is possible. However, the new claim must have the same characteristics as the original claim in terms of risk.[43]

The yields can never be capitalized.

IICs can issue obligations or other forms of loans to finance their portfolio of claims within the limits of their bylaws or their rules and regulations and within the limits set by the Royal Decree (RD).[44]

## 4. Control

ICCs are subject to the control of the Bank and Finance Commission.[45]

When mortgage claims are transferred, the ICC must be registered as mortgage company, and also subject to the *Controledienst voor de Verzekeringen* (Control Unit for Insurance).[46]

Theoretically, a controlling company cannot in principle be an assignor of claims unless the Bank and Finance Commission grants its authorization. A registrar can.[47]

## 5. Foreign institutions investing in claims

These institutions can also be authorized on the Belgian financial market. However, they must meet a certain number of conditions:[48]

(a) They must be subject, in their country of origin, to a similar control.
(b) They must prove that their administrative structure is compatible with the Belgian administrative structure.
(c) Their investment policy must be comparable to that of Belgian institutions.
(d) They must prove the same transparency in terms of information and data as Belgian institutions.
(e) The shares must be quoted on a stock market established in a member state of the European Community (EC).

42 Art. 51, §1 of the RD of 29 November 1993; BLG 7 December 1993.
43 Art. 52, §2 of the RD of 29 November 1993; BLG 7 December 1993.
44 Arts. 35 to 39 of the RD of 29 November 1993; BLG 7 December 1993.
45 Art. 49 of the RD of 29 November 1993; BLG 7 December 1993.
46 Aspecten en documenten; "Effectisering" ("sharization") Belgische vereniging van banken, May 1995 p. 27.
47 Art. 12 of the RD of 7 April 1995, BLG 3 May 1995.
48 Arts. 57 and 58 of the RD of 29 November 1993, BLG 7 December 1995.

## VI. Fiscal status

One of the main assets of the Belgian investment institutions is certainly the fiscal status. A distinction must be made between an investment company and an investment fund.

### 1. The investment company (closed end investment company – open end investment company – real estate investment company – company for investment in claims)

An investment is subject to corporate tax. The taxable basis is limited to the total
- of the received abnormal and favorable profits
- of the rejected expenses.[49]

Losses and write-offs must not be handled as rejected expenses but as a decrease in reserves, which is neutral for the taxable basis of these companies.[50]

The corporate tax which is eventually due is calculated according to the normal tariff of 39 per cent increased by the additional crisis tax of 3 per cent, bringing the tariff to 40.17 per cent.

However, investment companies are subject to a special tax of 300 per cent on secret commissions.

Investment companies cannot benefit from certain advantages which are specific to the corporate tax:[51]
- no rights to tax rate cuts;
- no deduction, as investment company of definitively taxed incomes (DTI);[52]
- no deduction of the foreign tax flat rate share (FTFRS).[53]

The (FTFRS) is not deductible but is also not a rejected expense.[54]

We can observe that the actual yields are not included in the taxable basis.

49 Art. 143, §1 of the law of 4 December 1990; BLG 22 December 1990.

50 Art. 32 of the law of 28 December 1992; BLG 31 December 1992 modified art. 143, §1 of the law of 4 December 1990; BLG. 22 December 1990.

51 Art. 143, §2 law of 4 December 1990; BLG 22 December 1990.

52 DTI: Definitively taxed income. Dividends received by a company are part of the taxable basis. Since the dividend is also part of the taxable basis of the distributing company, there is thus a form of double tax levy of the same profit. This double taxation is avoided by excluding most of the dividend received by the beneficiary from the taxable basis. However, this deduction is subject to two conditions: (a) taxation condition; the distributing Belgian company must be subject to corporate tax; or the distributing foreign company must be subject to a tax of the same nature as the Belgian corporate tax (b) minimum participation: on the date of attribution of the dividend, the beneficiary company must own a participation of at least 5 per cent of an acquisition value of at least BEF50,000,000.

53 FTFRS: foreign tax flat rate share. It is the deduction of movable income made abroad that were subject to a tax comparable to the Belgian income tax. The amount of deductible FTFRS amounts to 15/85 of the net income. Nothing special was provided for in terms of withholding tax. As a consequence the normal rules are applicable. The withholding tax must be considered as a non-deductible corporate expense and thus deductible from corporate tax.

54 See comments on withholding tax in note 53.

### *1.1. Withholding tax*

Investment companies are exempt from withholding taxes (WT) for all types of movable income they receive, both venture capital and non-venture capital, whether they are of Belgian or of foreign origin. Are excluded, income from Belgian shares and from all investment growth bonds and zero interest bonds. For these types of income, investment companies can deduct the withholding taxes (WT). Since the taxable base is virtually null, it means that the withholding tax levied (WT) is almost always refunded.[55]

Investment companies have access to the market of dematerialized public shares, certificates of deposit and treasury bonds. This means that the yields of these shares are always handled gross, without withholding taxes.[56] In the system of share scripturalization, investment companies have the same statute as exempted members. This means that this type of share is traded without withholding taxes being charged.[57]

### *1.2. Stock market tax*

Upon subscription by the investor, a stock market tax is due by the investor. This is an important expense factor which has a negative impact on the investment's attractiveness. In principle, this stock market tax is only due when the transaction is made in Belgium with a Belgian intermediary (bank or stock broker). Practically, this intermediary cannot be avoided since Belgian funds are only traded through banks or stock brokers.

However, an exemption is possible for the following investors:[58]

(a) the intermediary, as mentioned in article 3 of the law of 4 December 1990 on financial transactions and financial markets (banks or stock market companies);
(b) insurance companies, as mentioned in article 2, § 1 of the law of 9 July 1975 on the control of insurance companies;

55 "Het nieuwe stelsel van de roerende inkomsten" (The new system of movable income): Tony Bonte, Martine De lLuck and Kristin Van Elslander; Uitgeverij Biblo, 2920 Kalmthout; p. 37.

56 The legal regulation is incorporated in the law of 21 January 1991, BLG 25 January 1991 on the government debt share market and government monetary tools. The withholding tax regime is ruled by RD of 25 January 1991. The law of 2 January 1991 was later completed with the law of 22 July 1991, BLG of 21 September 1991, the law on treasury bonds and certificates of deposit. In the RD of 14 October 1991, BLG of 19 October 1991, we can find the regulation on withholding tax exemption.

57 Law of 6 August 1993, BLG of 6 August 1993 "Law on transactions with specific effects". The regulation on withholding tax was ruled by RD of 26 May 1994, BLG. 3 June 1994 Royal decree on the withholding and refunding of the withholding tax according to chapter I of the law of 6 August 1993 on transactions with a determined effect. Completed with RD of 23 January 1995, BLG of 7 February 1995 and RD of 15 December 1995, RD of 23 December 1995.

58 Code for equalization stamp tax art. 126.

(c) retirement savings funds as referred to in article 2, §3, 6°, of the law of 9 July 1975 on the control of insurance companies and the Royal Decree of 15 May 1985 on the activities of private provident companies;
(d) institution for collective investment;
(e) non-residents.

The following tariffs are in force. Here, we have to take into account that the lawmaker has clearly shown a will to penalize capitalizing securities by applying a higher stock market tax.[59]

| | |
|---|---|
| Subscription to capitalizing shares: | 1 % |
| Subscription on dividend yielding shares: | 0.14 % |
| Purchase of capitalizing shares: | 0.50 % |
| Purchase of dividend collection shares: | 0 % |
| Selling of capitalizing shares through the stock market | 0.5 % |
| Selling of dividend yielding shares through the market: | 0.07 % |
| Conversion from capitalizing share to capitalizing share: | 1 % |
| Conversion from dividend yielding share to capitalizing share: | 1 % |
| Conversion from capitalizing share to dividend yielding share: | 0.50 % |
| Conversion for dividend yielding share to dividend collection share: | 0 % |

The maximum amount of a stock-market tax is BEF 15,000, except for dividend yielding shares with a maximum stock market tax of BEF 10,000.

### *1.3. Subscription tax*[60]

Investment companies (open end and closed end investment companies) are subject to a 0.06 per cent annual subscription tax, except for real-estate investment companies.

The taxable basis is the inventory value on 1 July of each year.

### *1.4. Registration taxes*[61]

In principle, all the provisions of the V-Code for registration rights are applicable to investment companies. An exemption of duties on yields in open end and closed end investment companies is also expressly provided for to the condition that the yields are paid off by shares exclusively. For the part of the income in a way other than in shares, the 12.5 per cent tariff is applicable.

59 Code for equalization stamp tax: arts. 120bis; 121 en 122.

60 The subscription tax was added to the RD of 27 September BLG of 7 October 1993 "royal decree for the modification of the Royal Decree of 31 March 1936 containing the general code of succession rights".

61 Registration tax code: art. 122 incorporated in the law of 4 December 1991, art. 147, modified by arts. 11 of the law of 5 August 1992 and 59,1° and 2° of the law of 28 December 1992. see also the repertory RJ R122 (Decree 2 June 1995, no. E.E./E.L. 1040).

### *1.5. VAT*

Investment companies are subject to VAT, but their operations are exempted. This exemption is also applicable to administrative fees, charged to the institution by third party companies, ruled by bylaws.[62]

The VAT paid out by these institutions always constitutes a definitive charge. They have no right to deduction from the tax levied on the goods and services they use in the context of their activity.

### *1.6. Exit tax*

The transfer of real-estate assets to a real-estate investment company was ruled by the law of 21 December 1994 Belgian Law Gazette (BLG) of 23 December 1994 articles 99 to 104.

The transfer of real estate assets in the capital of a real estate investment company results in principle in the taxation on the possible capital gain by the transferring company.

The capital gain is in principle taxable at the normal corporate tax tariff, with the possibility of distributed taxation. In certain cases, the transfer of real estate assets in a real-estate investment company results in a limited taxation of 20.085 per cent (19.5 per cent + 3 per cent of 19.5 per cent crisis tax). This is true under the following circumstances:

(a) the conversion of a real estate company into a real estate investment company in which the recognition of company as a real estate investment company is assimilated to a settlement;
(b) contribution to the capital by the split or the merger of a company (not a real estate investment company);
(c) contribution of capital placed in a Belgian institution by a company resident in the European Union in a real estate investment company by merger, split, or addition of a sector of activity or a generality of goods.

## 2. Investment funds

An investment fund is an indivisible capital and is thus the indivisible property of all participants. A fund has no legal personality and, as such, is not subject to corporate tax.

Yields are directly attributed to the participants. This means that yields are considered as being earned by the participants themselves.

This is why a withholding tax is levied on the income paid to the funds. When the participants are paid, withholding taxes are no longer levied. However, there

62 VAT code art. 44, §3, 11°. Question no. 614 of M. de Clippele on. 22.06.1993 Vr. and Antw., House, 1992-1993, no. 75, pp. 7218, 7219, 7220.

is an exception to that rule, in favor of special investment funds that were founded for specific non-resident depositors. This concerns depositors who are exempt from income tax in their land of residence. The income yielded by these investment funds are exempt form withdrawal taxes (WT). There is no withholding tax at the payment either (RV).[63]

Rules are different for investment funds investing in claims (FIC). Despite the fact that the fund represents an indivisible capital and the yield is considered as being earned by the participants themselves, no withholding tax is charged to the funds at the payment of the yields. However, when yields are paid to the participants, a withholding tax is charged.[64]

### *2.1. Stock market tax*[65]

(a) registration: 0.14 per cent
(b) withdrawal: 0 per cent
(c) secondary market: 0.07 per cent

The stock market tax amounts to BEF 10,000.

### *2.2. Subscription tax*

Investment funds are not subject to the subscription tax.

### *2.3. VAT*

Operations are exempted operations. This exemption is also applicable to fees charged to the institutions by third party companies ruled by bylaws.[66]

## VII. Double taxation

### 1. Investment companies

Investment companies are subject to corporate tax and can invoke double taxation relief. They will thus benefit notably from restrictions provided for by this taxation for withholding tax on movable assets.

63 RD/WIB 92 art. 106, §3 and 4 and art. 117, §3. This exemption was incorporated in the law of 18 January 1990. The goal was initially to provide a new orientation for the investment funds created in the framework of the RD 15 and 150 (at the beginning of the eighties). In reality, it appears that the goal was not reached.

64 A special regulation was provided for by the law of 4 April 1995. BLG 23 May 1995 and the RD of 30 May 1995 BLG 21 July 1995.

65 See also footnote 59.

66 The same regulation as for investment, see footnote 62.

According to the standard agreement by the OESO, only residents from one of the countries which have signed the agreement can claim to benefit from this taxation.

According to this OESO agreement, the expression "resident of a state that has signed the agreement"[67] means any person that, by virtue of the law of this state, is there subject to tax, in consideration of his place of residence, his stay, place of command or any other similar circumstance. According to the OESO agreement the notion of person includes natural persons, companies and other associations or persons.[68] The OESO agreement describes the company as an institution which can be considered as a legal entity in terms of taxation.

It is usually assumed in the legislation that the fact of being submitted in principle to the corporate tax is sufficient to have the right to claim the benefit of the taxation. If a company is not subject to corporate tax in the land were it is established, it cannot be considered as a company resident according to the agreement. Closed end investment companies under Belgian law are not exempt from corporate taxes, even when their taxable base is obviously limited. On the basis of the literal interpretation of the text, we can thus say that investment companies can benefit from the double taxation regime. It is not sure, considering the limited taxable basis of the investment companies, that some states which have signed the agreement will not be able to argue this double taxation amount. They could well argue that the submission to the Belgian corporate tax is actually only purely formal and is in fact absent.

It is in this case a comparative advantage to SICAVs from Luxembourg, which do not offer this possibility.

## 2. Investment funds

Investment funds have no legal personality. They are not subject to corporate tax and can not in their quality of "funds" invoke the double taxation regime. They are no "person" according to the double taxation regime. Each participant, on his own account, can invoke the application of the double taxation regime. For the application of double taxation, a transparency rule is necessary: yields should be translated in a clear allocation of the shares. Each sort of income should then be studied to see where the double taxation regime can be applied.

67 Art. 4, 1 of the OESO standard agreement.
68 Arts. 3, l,a and b of the OESO standard agreement.

# VIII. Fiscal regime of yields from investment institutions

## 1. Taxation regime for the pay-out of yields

### *1.1. Investment funds*

The pay-out of the fund's results has no fiscal consequences. Pay-outs are theoretically tax-free.

However, investment funds have several obligations to meet at the moment of the payment:

(a) The investment fund must, in order to allow correct assessment of tax due by the beneficiary, allot its gains over a given fiscal year. This means that the fund's profits must be classified as a function of their origin (shares, bonds, national, foreign ...)

(b) When there are foreign profits in the fund that have not yet been subject to withholding tax, the withholding tax must be levied by the registrar of the funds or the first intermediary paying out the income.

(c) In the absence of allocation, the income will be assimilated to interests from claims.

For investment funds investing in claims, a withholding tax is levied when the income is paid out. The acting company of these investment funds is debtor of the withholding tax. It must charge the tax and reimburse it.[69]

### *1.2. Investment companies*

Dividends that are paid out annually by the investment companies are subject to 15 per cent withholding tax.[70]

If the payment occurs at the purchase of shares, no withholding must be performed. The purchase bonus received is assimilated to a dividend equalling the positive difference between the purchase price and the part of the capital represented by the shares received on which no withholding tax must be charged.[71] In regard to the individual investor, the purchase bonus will be considered as a tax-free income.[72]

69 Law of April 4 1995, BLG 23 May 1995. See also arts. 261, 263, 265, 266, and 267 Income Tax Code 1992.

70 Art. 269 third part, c Law on Income Tax 1992.

71 Dividends include: complete or partial reimbursement of the corporate capital, except for the reimbursement of the injected capital obtained by the application of a lawful decision to decrease the corporate capital, in compliance with the recommendations of the coordinated laws of commercial companies art. 18, 2° Income Tax Code 1992. Het nieuwe stelsel van de roerende inkomsten [The new movable income system] Biblo-dossier Fiscaliteit-25 Tony Bonte, Martine De IUyck and Kristin Van Eislander p. 46. Art. 264, 2°WIB/92.

72 Incomes that cannot be taxed as income from movable goods and capitals. Incomes from shares paid or attributed by total or partial distribution of the corporate capital or the acquisition of their own shares by foreign companies and by investment companies as referred to in articles 114, 118 and 119 quinquies of the law of 4 December 1990 on financial transactions and financial markets. Art. 21,2° Tax Income Book, 1992

The open-end investment company must also allocate its dividends. This itemization makes the dividends of the investment company more transparent . That means that the income which has yielded this dividend maintains its initial nature in regard to the shareholders.[73] The purpose of this transparency rule is to:

(a) avoid that the incomes are transformed through an investment company.
(b) put the shareholders in the same conditions as a direct investor.

However, there is an exemption from withholding tax for non-residents on that part of the income that does not originate from Belgian shares. Another exemption is the exemption on the income from shares granted to:

(a) the state, communities, governments, provinces, local entities, association of municipalities, municipalities, public social welfare, municipal utilities in which the shares are the property of the public authorities;[74]
(b) international organizations of which Belgium is a member and which, by virtue of their structure, are exempt from income tax;
(c) non-resident depositors exerting a lucrative activity and which are exempt from income tax in their country of residence, such as foreign retirement savings funds as well as social or scientific institutions;[75]
(d) Belgian collective funds that are recognized by the Ministry of Finance. These are funds whose members are exclusively non-resident depositors (as above) and which must follow specific investment rules.[76]

A special exemption from withholding tax was designed for real estate closed end investment companies. It is a general exemption, regardless of the beneficiary of the income, from withholding tax on the income yielded by a real estate closed end investment company providing that this company invests a minimum of 60 per cent of its capital in Belgian residences.[77] For the moment, individual investors cannot benefit from this exemption. Furthermore, the law specifies that the taxable person must mention the dividends in the personal income tax.[78]

### *1.3. Fix funds*

The government has recently modified[79] the status of income from open end investment companies with a pre-determined fixed return and a determined duration. These investment companies are better known under the denomination of "fix funds". In contrast with what had been specified earlier, the purchase bonus

73 The regulation on dividend allocation can be found in the RD of 3 June 1994, BLG of 3 June 1994 Royal Decree concerning the allocation of dividends of open end companies according to Belgian law. The legal base of this allocation can be found in art. 143, §3 law of 4 December 1990 BLG 22 December 1990. Law on financial transactions and financial markets.

74 Art. 264, 1° Income Tax Code 1992.

75 Art. 106, §2 RD in application of the Income Tax Code 1992.

76 Art. 106, §3 RD in application of the Income Tax Code 1992.

77 RD of 30 May 1995, BLG 1 July 1995.

78 Art. 313, 1° of the Income Tax Code.

79 Law of 20 March 1996, BLG 7 May 1996 "Law on the fiscal provisions regarding withholding taxes".

granted when the shares are purchased is no longer assimilated to a tax-free dividend and will henceforth be considered as interest. Withholding tax is due on this interest, this is thus not tax-free income. The conditions to be considered as fix-fund is the guarantee of a fixed return and a duration less than or equal to eight years. These two conditions must be met. Today, it is still unclear what is the exact meaning of "fixed return-reimbursement amount – yield base". Practice will have to clarify these elements in compensation, stock market tax has been lowered. This means that at registration, 0.14 per cent of stock market is withheld; no stock market tax is due at the purchase, and when sold on the secondary market, the stock market tax is 0.07 per cent. The maximum stock market tax is BEF 10,000. These are the same tariffs as for investment funds.

## 2. On the rights of the beneficiary of the incomes

### *2.1. The beneficiary is a natural person*

#### 2.1.1. Investment funds

When the participant is a natural person, we have to make a distinction between investment in a private context and investment for professional purposes.

In any case, in order to be able to determine the nature of the investment income, the taxation which must be applied and the possibility of a deduction, we have to determine the origin of the assets before the creation of the investment fund. This is why the allocation is so important.

If the investment fund yields a dividend, it will be considered as a dividend for the final beneficiary. The final beneficiary can report the amount of the payment in his personal income tax and thus receive the payment of withholding tax supported by the investment fund. The funds must allocate. When the allocation is not performed, the total payment is assimilated to interest from claims.

Persons who have performed the investment with a professional goal must always make a personal income tax declaration (income is included in the taxable profits). For investments in a private context, the declaration of the yield is made optional by the withholding tax.[80]

For investment funds investing in claims, a withholding tax will be levied. (See VIII.1 below.)

#### 2.1.2. Open- and closed end investment companies

A distinction must be made as a function of whether the yields are a result of the purchase of own shares, a sale, or a simple dividend transfer.

Dividends are subject to withholding tax. Here too, the distinction between investments made in a private context or investment with a professional purpose

[80] However, there are some disadvantages to these trade practices. The generalized deduction of the withholding tax through collection by the fund, excludes the exemption from the withholding taxes of which some investors could benefit if they were investing directly.

is important. For an investment in a professional environment, the taxable person will deduct the withholding tax from his income tax declaration. The private investor is exempt from declaration because of the withholding tax.

Capital gains on shares on purchase or on sales are in principle totally tax free for private investors. In the professional sector, this will result in a capital gains tax.

### *2.2. The beneficiary is a company*

#### 2.2.1. Open- and closed end investment companies

In the case of dividends from distribution investment companies, the withholding tax is theoretically deducted. For the company beneficiary, dividends are taxable elements. An exemption of the dividend in the taxable profit is possible by the application of the DTI deduction (definitively taxed income).[81]

Basically, the law excludes the dividends of investment companies explicitly from the application of the DTI. This exclusion can be overruled when one is able to prove that the dividend comes from dividends complying to the qualitative conditions. The DTI deduction can then be obtained on the part of the dividend complying to the conditions.[82] Therefore, a dividend allocation is vital.[83]

This transparency is also important for the deduction of the flat rate share of foreign tax. The lawmaker accepts this type of deduction providing that the dividends are yields by similar incomes.[84] DFTFR cannot result in a reimbursement of taxes.

Capital gains yielded by a company are in principle free of corporate tax. The only condition is that the underlying income of these shares must be taken into account for the DTI deduction. The transparency rule is also applicable here. The investing company is eligible for that exemption under the condition that the totality of the income yielded by the share is eligible for DTI deduction.[85] This is

81 Dividends collected by a company are part of the taxable base. Since the dividend is also considered as taxable base for the paying company, there is here a situation of double tax withholding on one single profit element. This double taxation is avoided by excluding a significant part of the dividend received by the beneficiary from the taxable base. The rule specifies that 95 per cent of the income yielded by dividends is deductible from the taxable profit. However, two conditions must be met:

(a) the paying company is subject to corporate tax in Belgium or to a similar tax abroad.
(b) the participation has a value of BEF50,000,000 or represents 5 per cent of the corporate capital of the paying company.

82 Art. 203, 3° and last part of the Income Tax Code.

83 See below.

84 DFTFR: deduction of the foreign tax flat rate from Belgian tax. For interest, the deductible amount is calculated taking the tax actually paid into consideration, but absolutely limited to 15 per cent and providing that the global incomes is not financed by claims. The DFTFR on dividends is in principle abrogated. There is one exception: dividends paid or granted by investment companies. There is still a DFTFR deduction for the for the part of the dividend yielded from movable income that are not dividend themselves, or from different incomes (those referred to in art. 90, 5° to 7°) that are taxed abroad. In other words, dividend allocation is important.

85 Parl, question no. 933, 25 February 1994 de Clippele.

practically impossible since we can imagine that capital gains are not exempt from corporate tax. Capital gains on shares from real-estate investment companies are totally excluded, since the totality of the possible income is eligible for the DTI deduction. These closed-end investment companies invest in real estate, including immovable properties.

The regime applicable to the income yielded by the company from the resale of its own shares by the investment company is the same as the dividend payment. The liquidation bonus is balanced by a dividend equalling the positive difference between the purchase price and the part of the capital represented by the shares received.[86] The rules of the DTI deduction are applicable here. Dividend allocation is also important. If the investment company does not perform this allocation, the rebate, the deduction is canceled and the bonus will be fully taxed. which is always the case in practice.

#### 2.2.2. Investment funds

As we mentioned previously, investment funds are fiscally transparent. Its incomes are the participants' incomes. The incomes have the same status they have for the fund.

On the basis of dividend allocation, the incomes will be subject to the appropriate taxation regime, with a possible deduction of the levied withholding tax and possible application of the DTI and DFTFR deductions.

Capital gains are taxable incomes for the company.

### *2.3. The investor is subject to personal income tax*

#### 2.3.1. Open end and closed end investment companies

For these taxable companies, withholding tax constitutes a definitive tax.[87] Dividend allocation is not necessary in this case.

Yielded capital gains are not taxable incomes, both at purchase and upon sale on the secondary market.[88]

#### 2.3.2. Investment funds

Yielded capital gains represent directly the net result and are thus also free from any tax. Dividend allocation has thus no importance in this case.

86 Art. 186 first part Income Tax Code 1992.
87 Art. 225, first part Income Tax Law 1992.
88 Rep St. Senate 1990-1991, 1007/2, 18.

### *2.4. The investor is a non-resident*

#### 2.4.1. Open and closed end investment company

A non-resident can benefit from an exemption for the part of the dividend which is not yielded by Belgian dividends. Transparency is very important here in order to be able to make a distinction between Belgian dividends and other incomes. To be eligible for this exemption, several obligations must be complied with.[89]

There is a significant exception to that general rule concerning real-estate investment companies. The general rule is that there is no exemption, whatever the beneficiary unless the company can prove that a minimum of 60 per cent of its real-estate assets is invested in residential buildings.[90]

#### 2.4.2. Investment funds

This form of investment is theoretically unfavorable for a non-resident. The withholding tax is levied when the income is paid out to the funds. The non-resident thus receives no tax-free income. Individually, the double taxation regime could be invoked. For investment funds investing in claims an exemption from withholding tax can be granted and the income can be paid out tax-free. When incomes are paid off to these funds, no withholding tax is charged

A special case is the funds that are designed for specific non-resident depositors. These funds benefit from a preferential exemption from withholding tax on their legally performed investments.[91]

**Résumé**

La législation en vigueur sur les institutions belges de placement en commun (*ICB-Instelligen voor Collective Belegging)* est tout à fait récente. Les principes en ont été établis à la fin de 1990 (loi du 4 décembre 1990 sur les transactions financières et les marchés financiers). La législation, complétée par divers décrets royaux, a permis à certaines institutions de placement en commun bien définies de voir le jour en Belgique.

Le cadre juridique qui préside à la formation et au fonctionnement administratif des institutions est décrit en premier lieu. Les premières règles législatives ont trait à l'octroi de la personnalité morale à des institutions qui investissent en liquidités et en valeurs mobilières, et à celles qui investissent dans des biens. C'est seulement par la suite qu'une loi a été promulguée pour régir les institutions ayant pour but d'effectuer le recouvrement de

89 Art. 106, §7 and 117, §6 Royal Decree Income Tax Code 1992.
90 Art. 106, §8 RD Income Tax Code 1992.
91 Art. 106, §3 and 117, §3 RD Income Tax Code 1992.

créances. Une distinction est établie en droit privé entre les institutions d'investissement en commun sous forme de société (bevek-bevak), et les institutions constituées en entité (fonds). Les sociétés d'investissement possèdent la personnalité juridique et ont un capital distinct, alors qu'un fonds n'a pas la personnalité juridique et que son capital est indivis. Le droit administratif va plus loin en ce qui concerne les conditions de reconnaissance, la politique d'investissement, l'émission de titres et de certificats de participation, les clauses d'interdiction, la publication des données et le contrôle des institutions d'investissement. Les institutions harmonisées pour l'investissement en commun ont également été traitées. Il s'agit des institutions dotées d'un „passeport européen". Une fois reconnues dans un Etat membre, elles peuvent vendre leurs droits dans un autre Etat membre sans la reconnaissance préalable de cet autre Etat. Ces institutions sont toujours contrôlées dans le pays d'origine.

Ce n'est qu'en 1992 (loi d'août 1992) que des institutions d'investissement autorisées à investir dans le recouvrement des créances ont été créées. Le cadre juridique et administratif ne traite que des règles qui se réfèrent expressément à ces institutions et qui s'écartent des règles régissant les autres institutions.

Le régime fiscal des institutions d'investissement en commun considère tout d'abord la manière dont les revenus de ces institutions sont imposés. Il convient de noter en l'occurrence que le régime fiscal applicable aux sociétés est différent de celui qui s'applique aux fonds. L'assiette de l'impôt grevant les sociétés d'investissement ne comporte que les revenus, les avantages en nature exceptionnels et les dépenses non imputables. Les bénéfices effectifs, les revenus de leurs activités réelles, ne sont pas imposés. Il n'y a pas d'assiette de l'impôt pour ce qui concerne un fonds. Les fonds sont des entités et les revenus seront imposés conformément aux règles spécifiques applicables à l'investisseur lui-même. Les revenus d'une société d'investissement ne sont pas assujettis à une retenue à la source (impôt anticipé) dans le principe; par contre, un fonds de placement est assujetti à un impôt anticipé sur les revenus encaissés. Toutefois, ce n'est pas le cas pour les fonds qui investissent dans le recouvrement de créances (pas de retenue à la source sur les revenus encaissés).

Par ailleurs, le rapport passe en revue les autres impôts qu'une institution d'investissement doit contester, à savoir les droits sur les opérations boursières, les droits d'enregistrement, les droits de souscription et la taxe à la valeur ajoutée (TVA). L'application des conventions de double imposition est également différente selon qu'il s'agit d'une société d'investissement ou d'un fonds de placement.

En dernière analyse, il est question de la manière dont les revenus des institutions d'investissement seront imposés en ce qui concerne les investisseurs eux-mêmes. La fiscalité diffère selon le type d'investisseur (personne physique, société, non-résident ou personne juridique).

**Zusammenfassung**

Die derzeitige Gesetzgebung über die belgischen Institutionen für Kollektivinvestition (ICB – Instellingen voor Collectieve Belegging) ist recht neuen Datums. Die Grundlagen wurden erst Ende 1990 gelegt (Gesetz vom 4. Dezember 1990 über Finanzgeschäfte und Finanzmärkte). Das durch mehrere königliche Erlasse ergänzte Gesetz ermöglichte die Errichtung bestimmter genau definierter Institutionen für Kollektivinvestitionen in Belgien.

Zunächst folgt eine Beschreibung des Rahmens der Vorschriften, die die Bildung und Verwaltung der Institutionen bestimmen. Die ersten Vorschriften betrafen die Gründung von Institutionen, die in Liquiditäten und Wertpapieren, sowie derer, die in Immobilien investieren. Erst später wurde ein Gesetz für Institutionen geschaffen, deren Zweck im

Inkasso von Forderungen besteht. Privatrechtlich wird unterschieden zwischen Kollektivinvestment-Institutionen in Form einer Gesellschaft (bevek-bevak) und denen, die als Fonds konstituiert sind. Investmentgesellschaften haben Rechtspersönlichkeit und eigenes Kapital, während ein Fonds keine Rechtspersönlichkeit besitzt und sein Kapital in Gemeineigentum steht. Das Verwaltungsrecht regelt darüber hinaus die Voraussetzungen für die Anerkennung, die Anlagepolitik, die Ausgabe von Wertpapieren und Anteilsscheinen, die Verbotsklauseln, die Datenveröffentlichung und die Aufsicht über die Investmentinstitutionen. Es gibt auch Bestimmungen über harmonisierte Institutionen für Kollektivinvestment. Dabei handelt es sich um Einrichtungen mit „europäischem Pass". Sind sie in einem der Mitgliedstaaten anerkannt, können sie Anrechte in anderen Mitgliedstaaten verkaufen, ohne dort zuvor anerkannt worden zu sein. Diese Einrichtungen werden stets im Ursprungsland überwacht.

Erst 1992 (Gesetz von August 1992) wurde es möglich, Investmentinstitutionen zu gründen, die im Schuldeninkasso investieren. Der Rechts- und Verwaltungsrahmen befaßt sich nur mit Regeln, die sich speziell auf diese Institutionen beziehen und von den für anderen Institutionen geltenden Regeln abweichen.

Der steuerliche Status von Institutionen für Kollektivinvestment geht zunächst von der Frage aus, wie die Einkünfte dieser Institutionen besteuert werden. Hier sollte beachtet werden, dass sich das Steuersystem für Unternehmen von dem für Fonds geltenden unterscheidet. Die Bemessungsgrundlage für Investmentgesellschaften besteht nur aus Einkünften, außerordentlichen und vorteilbringenden Sachleistungen und abzugsfähigen Aufwendungen. Der wirkliche Gewinn, der Ertrag aus der tatsächlichen Geschäftstätigkeit ist nicht steuerpflichtig. Bei einem Investmentfonds gibt es keine Bemessungsgrundlage. Ein Fonds ist eine ganzheitliche Grösse, und die Einkommensbesteuerung erfolgt nach den speziellen Regeln, die für den Anleger selbst gelten. Die Einkünfte einer Investmentgesellschaft sind grundsätzlich nicht der Quellensteuer (Verrechnungssteuer) unterworfen, im Gegensatz zu denen eines Investmentfonds, auf dessen Einkünfte eine Verrechnungssteuer an der Quelle erhoben wird. Dies gilt nicht für Fonds, die im Schuldeninkasso investieren (keine Quellensteuer auf die Einkünfte).

Anschliessend werden die sonstigen Steuern erörtert, die auf eine Investmentinstitution zukommen, wie z. B. Börsengebühren, Anmelde- und Zeichnungsgebühren und Mehrwertsteuer. Die Anwendung von Doppelbesteuerungsabkommen ist ebenfalls unterschiedlich, je nachdem, ob es sich um eine Investmentgesellschaft oder einen Investmentfonds handelt.

Schliesslich wird untersucht, wie die Einkünfte aus Investmentinstrumenten bei den Anlegern selbst versteuert werden. Die Steuerbarkeit schwankt je nach dem Typ des Anlegers (Privatanleger, Firma, Steuerausländer oder juristische Person).

**Resumen**

La legislación vigente sobre instituciones belgas de inversión colectiva (ICB – *Instelligen voor Collective Belegging*) es muy reciente. Los principios se establecieron a finales de 1990 (ley de 4 de diciembre de 1990 sobre transacciones y mercados financieros). La legislación, completada por varios reales decretos, ha permitido la creación de determinadas instituciones de inversión colectiva bien definidas.

En primer lugar se describe el marco jurídico que preside la formación y funcionamiento administrativo de estas instituciones. Las primeras normas se refieren a la concesión de personalidad jurídica a instituciones que invierten en valores mobiliarios y líquidos y a las que invierten en bienes. Una ley posterior ha regulado las instituciones cuyo fin es el cobro de

créditos. En derecho privado se establece la distinción entre instituciones de inversión colectiva en forma de sociedad (bevek-bevek) y las constituídas como entidad (fondos). Las sociedades de inversión gozan de personalidad jurídica y tienen capital distinto, en tanto los fondos carecen de personalidad jurídica y tienen capital indiviso. El derecho administrativo va más allá en las condiciones de reconocimiento, política de inversión, emisión de títulos y certificados de participación, cláusulas de prohibición, publicación de datos y control de las instituciones de inversión. También se contemplan las instituciones armonizadas de inversión colectiva. Se trata de instituciones dotadas de "pasaporte europeo". Una vez reconocidas en un Estado miembro, pueden vender sus derechos en otro Estado miembro sin reconocimiento previo de este último. Estas instituciones se controlan siempre en el país de origen.

Las instituciones de inversión en cobro de créditos se autorizaron en 1992 (ley de agosto de 1992). El marco jurídico y administrativo se refiere sólo a las normas expresamente relacionadas con estas instituciones y que se apartan de las que rigen las demás. Hay que precisar que el régimen fiscal aplicable a las sociedades es distinto del que se aplica a los fondos. La base imponible del impuesto sobre sociedades de inversión incluye sólo las rentas, las remuneraciones en especie extraordinarias y los gastos no imputables. No son gravados los beneficios efectivos y las rentas de sus actividades reales. No existe base imponible en los fondos. Los fondos son entidades y las rentas resultan gravadas conforme a las normas específicas aplicables al propio inversor. Las rentas de una sociedad de inversión no están sujetas, en principio, a retención en la fuente (impuesto anticipado); por el contrario, un fondo de inversión está sujeto a retención sobre las rentas cobradas. Este no es el caso, sin embargo, de los fondos que invierten en el cobro de créditos (no existe retención en la fuente sobre las rentas cobradas).

Por otra parte, la Ponencia estudia los demás impuestos a que una institución de inversión debe hacer frente, es decir, tasas por operaciones bursátiles, derechos de registro, de suscripción e IVA. La aplicación de los Convenios difiere también según se trate de sociedades de inversión o fondos de inversión.

Por último, se examina la imposición de las rentas de las instituciones de inversión en lo que se refiere a los propios inversores. La tributación difiere según el tipo de inversor (persona física, sociedad, no residente o persona jurídica).